76

FILED
AUG 29 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 306 "A"

G. D. BATEN,
Petitioner and Appellant below,
v.
NONA-FLETCHER MINERAL COMPANY,
Respondent and Appellee below.

Petition "A" for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

G. D. BATEN,
Petitioner in Pro Per

ALPHA LAW BRIEF CO., HOUSTON

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No._____"A"

G. D. BATEN,
Petitioner and Appellant below,
v.
NONA-FLETCHER MINERAL COMPANY,
Respondent and Appellee below.

Petition "A" for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner respectfully presents this application for a Writ of Certiorari in the above cause as follows:

I.

Statement of the Case

1. On behalf of himself as a stockholder of the Respondent Corporation, as well as for other stockholders in similar situation, Petitioner filed suit in the United States District

Court for the Eastern District of Texas praying for certain equitable relief, including injunction and receivership, and for the annulment of two *ultra vires* acts of the Respondent's board of directors (R. 19).

Two other persons, Bowers and Gordon, claiming certain rights under contract with Respondent and as creditors of the Corporation, joined in this Petitioner's action, seeking the same injunction and custodial relief.

The bill of complaint was therefore a combined stockholders' and creditors' bill, seeking common relief as to injunction and receivership. It is presented here, on material allegations upon the face of which the court dismissed the suit for want of jurisdiction, on the sole ground that other persons of the same State with plaintiffs are "indispensable" parties.

2. The Bill of Complaint, filed March 12, 1951, is in substance as follows:

Introduction of the parties plaintiff G. D. Baten, W. O. Bowers, Jr., and W. D. Gordon, citizens of the State of Texas, and the defendant Nona-Fletcher Mineral Company, a corporate citizen of the State of Delaware, and statement that the matter in controversy exceeds in value the sum of Three Thousand Dollars, and that plaintiff Baten sues as a stockholder of defendant corporation and on behalf of other stockholders similarly situated, and that the other plaintiffs Bowers and Gordon as attorneys employed by said corporation sue for the fixing and establishing of their compensation and as creditors join with the plaintiff stockholder in the equitable remedies sought against certain *ultra vires* acts committed by the directing agencies of the corporation. (R. 1-2)

Then follows the allegations of the bill, viz:

First. (1) For the urgent equitable relief herein sought, and (2) for judgment declaring and fixing the rights and status of the attorneys growing out of an incident to their employment and contractual obligations with the respondent corporation. (R. 3)

Second. This section alleges the corporation acquisition of 4,176 acres of land and its perfect record title thereto, stating the details of its ownership and possession covering antecedent chains of consecutive tenures, uninterrupted by an adverse claim for forty-three years. (R. 3-9)

Third. This recites the employment of attorneys Bowers and Gordon to clear the land of newly asserted adverse claims by parties seeking to interfere with the corporation's use and possession of its property and with its oil lessees and their acts thereunder. (R. 9 to 11)

Fourth. This details the facts stated briefly on page 3 of the opinion of the Court of Appeals as to the attempt of the president of the corporation to settle the adverse claim by conveying one-fourth (¼) of the corporation's acreage for a quitclaim. It was on objection of the company's attorneys that such claim was "patently void and unenforceable" "not consummated at that time". (R. 11 to 12) The bill further alleges that on February 22, 1951, without advice of its attorneys Bowers and Gordon (Opinion 3) the officers of the corporation made the settlement by conveying to these claimants 225 acres. (R. 11 to 14) The deed, ordered by the board under legal advice and direction of Mr. Parker as such claimants' attorney, was immediately signed by the corporation's executive officers, and in a meeting lasting about ten minutes, and at the same time previous orders prepared by Mr. Parker ordering all the remaining oil property of the company to be conveyed to its 46 stockholders and a deed to this effect was immediately signed by such executive officers and the instruments registered and

recorded the next day. (R. 11 to 14) See Exhibit "A", deed to Anderson claimants reciting at the end, "This instrument shall have the effective date of November 9, 1948". (R. 29) The accompanying resolution provided that the case then pending in the Appellate Court at New Orleans should be dismissed.

Fifth. The bill avers that the foregoing proceedings were *ultra vires* under the corporate charter and the decisions of the State and Federal Courts, and the statutes of Texas. (R. 14-16)

Sixth. This clause alleges the act of the corporation directors in conveying away at the same time all the remaining property and assets of the corporation to all its stockholders as a form of liquidating dividend was a fraud upon its creditors, including its attorneys, and was void as *ultra vires*, condemned by the statute and decisions of the courts, state and federal. (R. 16 to 17)

Seventh. This section deals with the services of the attorneys, the great value of the subject matter involved, the nature of their employment and seeks, upon consideration of the facts and circumstances, a determination of the value of their services and "upon such determination, that the matter of fees due petitioners be enforced as in law and equity they are entitled to." It concludes the bill as follows: "The transfer of all its assets by the board of directors is utterly void, not only as to its creditors, such as your petitioners and the United States Government are, but as to its stockholders, who are the real owners and beneficiaries of the property involved, and Your Honor should so hold:

"(1) That the transaction by which this company's property has been given away to an adversary without just cause or claim be annuled as void and *ultra vires*, and

"(2) That the disposal of all its corporate assets upon which it can pay its debts and upon which the corporation can continue to exist be declared utterly null and void." (R. 19)

Eighth. The bill concludes with the following prayer:

"(1) That an injunction be issued, after due hearing on this case, forever annuling the transactions whereby its property has been purloined and transferred without consideration valid in law, and for such other injunctive relief as the merits of this case may seem appropriate and just.

"(2) That Respondent and its agents and attorneys be enjoined from interfering with Petitioners in discharging their duties in presenting appellants' case in the United States Court of Appeals, and from otherwise interfering with them in carrying out their contractual employment and professional obligations.

"(3) That a Receiver, in all events, be appointed by Your Honor to take possession of this company's property and estate and administer it pending a final determination of this case and of its controversy with other parties, and that such other relief be awarded for the purpose of preserving through the custody and arm of this Court this valuable estate so groundlessly dissipated, and the corporation's life and existence imperiled if not destroyed through the mismanagement of the so-called Trustees or Board of Directors.

"(4) That such other and further relief be awarded your Petitioners as in law and equity they may be entitled to receive whether herein specially prayed for or not.

(Note: This original bill was filed March 12, 1951. On March 19, 1951 the plaintiff having learned that on an ex-

parte application made by respondent to the United States Court of Appeals, that tribunal had dismissed the pending appeal, these petitioners filed its First Amendment to this bill). (R. 21-22)

3. The Respondent on March 29, 1951, filed a motion to dismiss the case on the ground that it was a suit "to annul two written deeds" (R. 23-24).

4. The trial court granted this motion and dismissed the case August 9, 1951. (R. 66)

5. The case was appealed, and on July 18, 1952, the order of dismissal for want of jurisdiction was affirmed. (Opinion 1 to 5)

II.

Reason for Allowance of the Writ

The cause of action brought by Petitioner to annul two *ultra vires* acts of the Corporation under and by virtue of which its executive officers confiscated its visible assets and destroyed the corporate business (R. 19) *was not a suit to cancel deeds* to land, in which petitioner was in no way a party, and the lower courts erred in so holding, and in denying the right of this stockholder to the jurisdiction of the Federal Court to grant the relief prayed for. (R. 20)

III.

Remarks and Prayer for the Writ

Without enlarging this petition by rehearsing the authorities cited and quoted from in *the joint "Appellants' Brief"* as well as in *this Petitioner's Brief for Appellant Stockholder* filed in the Court of Appeals, both herewith presented, your applicant respectfully refers to same as conclusive of any such contentions. To the contrary of this unbroken current

of authority, there has not been presented, and we affirm there cannot be presented, a single case in American jurisprudence. Such action is therefore unprecedented and arbitrary; a denial of due process of laws.

Not only did this stockholder not present such a suit to the court, but is denied by universal rules of law and procedure the right or power to do so. A stockholder of a corporation cannot sue to cancel a corporation's deed to the corporate land. He can, and in this case did, seek to cancel and annul *ultra vires* acts of corporate directors, and invoke the power and authority of courts of equity, through injunction and receivership, to pursue in a proper proceeding and recover corporate assets of great value, passed to other persons by void and fraudulent corporate acts. That is what this Petitioner did here, and the denial of the jurisdiction of the court, in this case, is unprecedented and arbitrary. This language is justified by the Record here and by the cases cited and quoted from in the two above referred to briefs, filed in the lower courts and accompanying this petition, and by reference made a part hereof.

It is therefore respectfully requested that Your Honors grant Petitioner a Writ of Certiorari directing said Court of Appeals to certify to this Court the proceedings, now lodged with its clerk, for inspection and review and for decision of this Court, conformably with its rules of practice and procedure; and Petitioner further prays that this Honorable Court grant to him general relief of such nature and kind as the cause may require whether herein specially prayed for or not.

I hereby certify that I have personally served W. E. Orgain, attorney for Respondent, with a copy of this Petition, before presenting it to this Court.

G. D. BATEN,
Petitioner in Pro Per

FILED
SEP 29 1952

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 306 "A"

G. D. BATEN, *Petitioner and Appellant Below*

v.

NONA-FLETCHER MINERAL COMPANY, *Respondent and Appellee Below*

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

WILL E. ORGAIN,
ORGAIN, BELL & TUCKER,
First Federal Savings Building,
Beaumont, Texas,
Attorneys for Respondent

ALDINE LAW PRINT CO., HOUSTON

SUBJECT INDEX

	PAGE
OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATEMENT	2
ARGUMENT	3
AUTHORITIES	4
CONCLUSION	5

INDEX OF AUTHORITIES

Forsythe v. Hammond, 166 U.S. 506, 514; 17 Sup. Ct. 665; 41 L. Ed. 1095	4
Hamilton Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251; 36 Sup. Ct. 269; 60 L. Ed. 629	4
Houston Oil Co. of Texas, et al., v. Goodrich, et al., 245 U.S. 440; 38 Sup. Ct. 140; 62 L. Ed. 385	4
Layne & Bowler Corporation v. Western Well Works, Inc., et al., 261 U.S. 387, 393; 43 Sup. Ct. 422; 67 L. Ed. 712	4
Magnum Import Co. v. Coty, 262 U.S. 159, 163; 43 Sup. Ct. 531; 67 L. Ed. 922	4
Southern Power Co. v. North Carolina Public Service Co., et al., 263 U.S. 508; 44 Sup. Ct. 164; 68 L. Ed. 413	4
United States v. Johnston, 268 U.S. 220; 45 Sup. Ct. 496; 69 L. Ed. 925	4
United States v. Daniel J. Rimer, 220 U.S. 547; 31 Sup. Ct. 596; 55 L. Ed. 578	4
Cyclopedia of Federal Procedure, 2nd ed., Vol. II, Sec. 5414, pages 55-56	4
Moore's Commentary on the U. S. Judicial Code (1949), p. 584	4
Robertson & Kirkham on Jurisdiction of the Supreme Court of the United States (1951), Sec. 310, p. 588	4
Stern & Gressman on Supreme Court Practice (1950), p. 112	4
Address of Chief Justice Hughes before the American Law Institute, 20 A.B.A.J., p. 341	4
Address of Chief Justice Taft, 35 Yale L.J., p. 240	4
Article by Justice Felix Frankfurter, 48 Harvard Law Review, p. 238	5
Article by Henry M. Hart, Jr., 53 Harvard Law Review, p. 595	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No._____"A"

G. D. BATEN, *Petitioner and Appellant Below*

v.

NONA-FLETCHER MINERAL COMPANY,
Respondent and Appellee Below

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

---

BRIEF FOR THE RESPONDENT IN OPPOSITION

Opinion Below

The opinion of the Court of Appeals is as yet unreported.

Jurisdiction

The judgment of the Court of Appeals was entered upon the 18th day of July, 1952 (R. 78). The Petition for Writ of Certiorari was filed on August 29, 1952. Notice of filing

was served upon Respondent September 5, 1952. Although not stated, it is assumed that jurisdiction of this Court is invoked under Title 28, U. S. C. A., Par. 1254.

Questions Presented

Whether or not the Circuit Court was in error in its holding that the relief sought and prayed for, being the cancellation of two deeds, would, if granted, injuriously affect the rights of the grantees in said deeds, therefore indispensable parties, none of whom were parties to the suit and who, if made parties, would destroy diversity and with it the sole ground for Federal jurisdiction of the suit in the District Court.

Statement

The Circuit Court opinion accurately states Appellant's pleading. The Circuit Court, after stating the nature of the suit and appellant's pleadings (R. 74) succinctly states the issue and the holding involved. It is there said:

> "A fair appraisal of the pleadings leaves us in no doubt that the real purpose of this suit is to cancel and set aside the conveyances above mentioned which appellant Baten, a stockholder in appellee, and appellants Bowers and Gordon, appellee's former attorneys, regard as ultra vires and executed without adequate consideration, thus unlawfully dissipating appellee's assets, impairing Baten's rights as a stockholder, and leaving Bowers and Gordon nothing out of which to recover their attorney's fees. The whole matter boils down to an internecine struggle within the appellee corporation. The request appearing only in the body of the complaint to fix the status of Bowers and Gordon, and to determine the value of their services, is apparently intended to establish for them a status

which would entitle them to seek a cancel-ation of the deeds. Without these allegations they could have no standing as plaintiffs. There is no prayer for a money recovery of attorney's fees.

"The primary relief sought—cancel-ation of the deeds—will, if granted, directly and injuriously affect the rights of the grantees in said deeds. These grantees are therefore indispensable parties, as the trial court held. Shields v. Barrow, 58 U.S. (17 How.) 129, 15 L. Ed. 158; Garzot v. Rios de Rubio, 209 U.S. 283, 52 L. Ed. 794; Calcote v. Texas Pac. Coal and Oil Co. (CA-5), 157 Fed. (2) 216; 167 A.L.R. 413, cert. den. 329 U.S. 782, 91 L. Ed. 671, rehearing denied, 329 U.S. 830, 91 L. Ed. 704; Vincent Oil Co. v. Gulf Refining Co. (CA-5), 195 Fed. 434; Keegan v. Humble Oil and Ref. Co. (CA-5), 155 Fed. (2) 971; Lawrence v. Sun Oil Co. (CA-5), 166 Fed. (2) 466.

"The grantees in both deeds are citizens of Texas, as are also the plaintiffs below. Their joinder will therefore destroy diversity and with it the sole ground for federal jurisdiction of this suit. In these circumstances the suit was properly dismissed for lack of indispensable parties." (R. 76-77)

Argument

The gravamen of Petitioner's complaint seems to be that the action was brought "to annul two ultra vires acts",—the acts of the corporation in executing two deeds of conveyance to land, and "was not a suit to cancel deeds to land," as was held by the Circuit Court. Such is the stated reason for allowance of the writ. There is nothing here involved except the construction of a pleading.

It is plain, both from the Petition for Writ of Certiorari and the Opinion of the Circuit Court that the decision of the court does not involve principles the application of which is of wide public or governmental interest. The mat-

ters involve a question of concern only to the immediate parties. The petition does not present a proper case of jurisdiction for this court to grant writ of certiorari to the Circuit Court of Appeals. The judgment of the Circuit Court is correct and is not in conflict with any other decision so as to warrant further review of the case by this court.

Authorities

Layne & Bowler Corporation v. Western Well Works, Inc., et al., 261 U.S. 387, 393; 43 Sup. Ct. 422; 67 L. Ed., 712;

Magnum Import Co. v. Coty, 262 U.S. 159, 163, 43 Sup. Ct. 531; 67 L. Ed. 922;

Forsyth v. Hammond, 166 U.S. 506, 514; 17 Sup. Ct. 665; 41 L. Ed. 1095;

United States v. Johnston, 268 U.S. 220; 45 Sup. Ct. 496; 69 L. Ed. 925;

United States v. Daniel J. Rimer, 220 U.S. 547; 31 Sup. Ct. 596; 55 L. Ed. 578;

Houston Oil Co. of Texas, et al., v. Goodrich, et al., 245 U.S. 440; 38 Sup. Ct. 140; 62 L. Ed. 385;

Southern Power Co. v. North Carolina Public Service Co., et al., 263 U.S. 508; 44 Sup. Ct. 164; 68 L. Ed. 413;

Hamilton Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251; 36 Sup. Ct., 269; 60 L. Ed. 629;

Robertson & Kirkham on Jurisdiction of the Supreme Court of the United States (1951), Sec. 310, p. 588;

Stern & Gressman on Supreme Court Practice (1950), p. 112;

Moore's Commentary on the U. S. Judicial Code (1949), p. 584;

Cyclopedia of Federal Procedure, 2nd ed., Vol. II, Sec. 5414, pages 55-56;

Address of Chief Justice Hughes before the American Law Institute, 20 A.B.A.J., p. 341;

Address of Chief Justice Taft, 35 Yale L.J., p. 240;

Article by Justice Felix Frankfurter, 48 Harvard Law Review, p. 238;
Article by Henry M. Hart, Jr., 53 Harvard Law Review, p. 595.

Conclusion

The Petition for Writ of Certiorari should be denied.

Respectfully sumitted,

WILL E. ORGAIN,
ORGAIN, BELL & TUCKER,
First Federal Savings Building,
Beaumont, Texas,
Attorneys for Respondent

Copy of this brief was on this the_____day of September, 1952, mailed to G. D. Baten, Petitioner.

FILED
AUG 29 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 307 "B"

W. O. BOWERS, JR. AND W. D. GORDON,
Petitioners and Appellants below,

v.

NONA-FLETCHER MINERAL COMPANY,
Respondent and Appellee below.

Petition "B" for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

W. O. BOWERS, JR., and
W. D. GORDON,
In Pro Per

ALPHA LAW BRIEF CO., HOUSTON

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No._____"B"

W. O. BOWERS, JR. AND W. D. GORDON,
Petitioners and Appellants below,

v.

NONA-FLETCHER MINERAL COMPANY,
Respondent and Appellee below.

Petition "B" for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

YOUR PETITIONERS RESPECTFULLY SHOW

I.

Statement of the Case

On July 18, 1952, the United States Court of Appeals for the Fifth Circuit in Cause No. 13,804 styled G. D. BATEN, ET AL., *Appellants,* v. NONA-FLETCHER MINERAL COMPANY, *Appellee,* affirmed the judgment of the United States District Court for the Eastern District of Texas which dis-

missed appellants' cause of action for want of jurisdiction. (Record, pp. 1-73)

Printed briefs were seasonably filed and oral argument presented in the Court of Appeals on April 21, 1952, and the dismissal affirmed in an opinion by Strum, Circuit Judge, upon the ground that the primary relief sought was the "cancellation of two deeds" by Nona-Fletcher Mineral Company and that the grantees, therein, who were citizens of Texas, were indispensable parties. "Their joinder will therefore destroy diversity, and with it the sole ground for federal jurisdiction of this suit. In these circumstances the suit was properly dismissed for lack of indispensable parties." (Opinion, p. 5)

See Bill of Complaint in Petition "A" filed herein.

II.

Reasons for Allowance of the Writ

1. The Court of Appeals correctly states in the first paragraph of its opinion the relationship of the parties plaintiff, G. D. Baten a stockholder and W. O. Bowers, Jr. and W. D. Gordon attorneys of Nona-Fletcher Mineral Company, but makes basic error in the second paragraph in its statement of the cause of action, to-wit: "As plaintiffs below they sued said corporation to 'annul' conveyances by the corporation of its mineral interests." (Opinion, pp. 1, 2)

The latter statement is not only unsupported by the record but is expressly and affirmatively contradictory of it and denies these petitioners their rights granted to them by law and guaranteed by the Constitution, Article 3, Section 2. (Record, pp. 1-22; Brief for Appellants, pp. 1-2)

The cause of action by these petitioners Bowers and Gordon is concisely stated in these words: "Hence, your

Petitioners ask your Honor, upon a hearing of this cause to determine not only the invalidity of the transactions above detailed but also to determine and fix by declaratory judgment what is a reasonable and competent compensation for the services of these Petitioners, and that upon such determination that the matter of fees due Petitioners be enforced as in law and in equity they are entitled to." (Bill of Complaint, R. p. 18)

2. G. D. Baten, the plaintiff stockholder, asserts a cause of action entirely apart from the attorney's cause of action asserted by these petitioners as creditors for attorney's fees. The defendant corporation is the only "indispensable" party under his bill of complaint praying that an injunction be issued, that a receiver be appointed and that such other and further relief be granted as he may be entitled to receive. The petitioners as creditors join in such prayer for injunction and receivership. (Rules 18, 19, FEDERAL RULES OF CIVIL PROCEDURE, "Brief for Appellant Stockholder") If after hearing, the facts would not support the issuance of an injunction or the appointment of a receiver, these petitioners would not thereby be denied their right to be heard on their cause for legal services rendered said corporation, detailed in the bill of complaint (R. pp. 1-20), even though said corporation had disposed of all its assets by *ultra vires* acts of its officers and directors or was insolvent

3. These petitioners have detailed in the bill of complaint their employment by the respondent corporation, the services so rendered as its attorneys to preserve its property against a void and baseless title claim (also reflected by the record filed in said Court of Appeals for the Fifth Circuit in Cause No. 13,354, styled NONA-FLETCHER MINERAL COMPANY v. JAMES F. PARKER ET AL.), and the *ultra vires* acts of said corporation's officers and directors in discharging petitioners as attorneys without complaint as to their

conduct and services and without compensation, employing other attorneys to dismiss the aforesaid cause, conveying certain mineral interests of the corporation without consideration (in settlement of said void and baseless claim) and distributing its remaining mineral interests to its stockholders. (R. pp. 1-20; Opinion, p. 4)

These petitioners are entitled to be heard upon the bill of complaint for compensation, and the only "indispensable" party to such cause of action is the respondent Delaware corporation and, if the facts support their allegations of *ultra vires* acts aforesaid by its officers and directors, an injunction should be issued to restrain them from further control of the corporation, and a receiver should be appointed to recover or bring suit to recover for the benefit of petitioners as creditors and all other creditors from the grantees of said corporation's two deeds.

4. This action is also brought by petitioners' motion filed herein on March 8, 1952, to set aside the order of dismissal by the Court of Appeals for the Fifth Circuit on March 13, 1951, of Cause No. 13,354, NONA-FLETCHER MINERAL COMPANY v. JAMES F. PARKER ET AL., under the express authority of the judicial act and amendment May 23, 1949, U. S. STATUTES, Title 28, Ch. 51, Secs. 2201-2, and Ch. 21, Secs. 451-2. *(See "Ancillary Brief and Motion for Appellants" p. 12, and also "Memorandum by Appellants Supporting Ancillary Brief and Motion", p. 1, citing Rule 60(b) as amended December 27, 1946, construed by the Supreme Court of the United States in* SPRAGUE v. TICONIC NATIONAL BANK, *307 U. S. 161, and* KLAPPROTT v. U. S., *335 U. S. 601)*

WHEREFORE, your petitioners pray that a WRIT OF CERTIORARI issue under the seal of this Court directed to the Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court a full and

complete transcript of the record and of the proceedings of said Court of Appeals had in the case numbered and entitled on its docket No. 13,804, G. D. BATEN ET AL., *Appellants*, v. NONA-FLETCHER MINERAL CO., *Appellee*, to the end that said cause may be reviewed and determined by this Court as provided for by the statutes of the United States, and that the judgments of said Court of Appeals and the District Court be reversed and the cause, upon admitted and indisputable facts, be adjudicated in favor of petitioners, as presented in their briefs and in conformity with the records as therein presented; and in the alternative, that said Court of Appeals be ordered to vacate its decree of affirmance and render such judgment for plaintiffs (appellants) as required by the indisputable facts of records therein pending and the justice of the case. Petitioners pray for such further and other relief as they may be in law and in equity entitled to receive.

W. O. BOWERS, JR., and
W. D. GORDON,
In Pro Per

I hereby certify that I have delivered a copy of this petition to Mr. Will E. Orgain, Attorney for Respondent, before presenting same in this court. This August _____, 1952.

W. O. BOWERS, JR.

SEP 29 1952

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 307 "B"

W. O. BOWERS, Jr. AND W. D. GORDON,
Petitioners and Appellants below,
v.
NONA-FLETCHER MINERAL COMPANY,
Respondent and Appellee Below.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

WILL E. ORGAIN,
ORGAIN, BELL & TUCKER,
First Federal Savings Building,
Beaumont, Texas,
Attorneys for Respondent.

SUBJECT INDEX

	PAGE
OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATEMENT	2
ARGUMENT	2
AUTHORITIES	4
CONCLUSION	5

INDEX OF AUTHORITIES

Forsythe v. Hammond, 166 U.S. 506, 514; 17 Sup. Ct. 665; 41 L. Ed. 1095	4
Hamilton Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251; 36 Sup. Ct. 269; 60 L. Ed. 629	5
Houston Oil Co. of Texas, et al., v. Goodrich, et al., 245 U.S. 440; 38 Sup. Ct. 140; 62 L. Ed. 385	4
Layne & Bowler Corporation v. Western Well Works, Inc., et al., 261 U.S. 387, 393; 43 Sup. Ct. 422; 67 L. Ed. 712	4
Magnum Import Co. v. Coty, 262 U.S. 159, 163; 43 Sup. Ct. 531; 67 L. Ed. 922	4
Southern Power Co. v. North Carolina Public Service Co., et al., 263 U.S. 508; 44 Sup. Ct. 164; 68 L. Ed. 413	5
United States v. Johnston, 268 U.S. 220; 45 Sup. Ct. 496; 69 L. Ed. 925	4
United States v. Daniel J. Rimer, 220 U.S. 547; 31 Sup. Ct. 596; 55 L. Ed. 578	4
Cyclopedia of Federal Procedure, 2nd ed., Vol. II, Sec. 5414, pages 55-56	5
Moore's Commentary on the U. S. Judicial Code (1949), p. 584	5
Robertson & Kirkham on Jurisdiction of the Supreme Court of the United States (1951), Sec. 310, p. 588	5
Stern & Gressman on Supreme Court Practice (1950), p. 112	5
Address of Chief Justice Hughes before the American Law Institute, 20 A.B.A.J., p. 341	5
Address of Chief Justice Taft, 35 Yale L.J., p. 240	5
Article by Justice Felix Frankfurter, 48 Harvard Law Review, p. 238	5
Article by Henry M. Hart, Jr., 53 Harvard Law Review, p. 595	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No._____"B"

W. O. BOWERS, JR. AND W. D. GORDON,
Petitioners and Appellants below,

v.

NONA-FLETCHER MINERAL COMPANY,
Respondent and Appellee Below

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

---

BRIEF FOR THE RESPONDENT IN OPPOSITION

Opinion Below

The opinion of the Court of Appeals is as yet unreported.

Jurisdiction

The judgment of the Court of Appeals was entered upon the 18th day of July, 1952 (R. 78). The Petition for Writ of Certiorari was filed on August 29, 1952. Notice of filing

was served upon Respondent September 5, 1952. Although not stated, it is assumed that jurisdiction of this Court is invoked under Title 28, U. S. C. A., Par. 1254.

Questions Presented

Whether or not the Circuit Court erred in affirming the judgment of dismissal by the District Court and its holding "that the real purpose of the suit is to set aside the conveyances" and that "the primary relief sought—cancelation of the deeds—will, if granted, directly and injuriously affect the rights of the grantees in said deed. These grantees are therefore indispensable parties".

Statement

The Circuit Court's opinion accurately states Petitioners' pleading; except it may be added that petitioners' jurisdictional allegations in the lower court applied only to the suit to cancel the deeds to land. It is alleged "The *matter in controversy* exceeds in value the sum of Three Thousand Dollars, *and lies within the Beaumont Division of this court.* Wherefore, this Honorable Court has jurisdiction of this cause." (R-2) (Italics ours).

Argument

Petitioners insist that the suit was "to annul two ultra vires acts—the acts of the corporation in executing two deeds of conveyances to land—and was not, as held by the District and Circuit Courts that "as plaintiffs below they sued said corporations to "annul conveyances by the corporation of its mineral interest". They further say that "If after hearing, the facts would not support the issuance of an in-

junction or the appointment of a receiver, these petitioners would not thereby be denied their right to be heard on their cause for legal services rendered said corporation", as was held by the court below. The suit was not one to recover a judgment for services rendered but to cancel deeds. The Circuit Court, after stating the nature of the suit, including petitioners' pleading (R-74) succinctly states the issues and its holding. There it is said:

> "A fair appraisal of the pleadings leaves us in no doubt that the real purpose of this suit is to cancel and set aside the conveyances above mentioned which appellant Baten, a stockholder in appellee, and appellants, Bowers and Gordon, appellee's former attorneys, regard as *ultra vires* and executed without adequate consideration, thus unlawfully dissipating appellee's assets, impairing Baten's rights as a stockholder, and leaving Bowers and Gordon nothing out of which to recover their attorney's fees. The whole matter boils down to an internecine struggle within the appellee corporation. The request appearing only in the body of the complaint to fix the status of Bowers and Gordon, and to determine the value of their services, is apparently intended to establish for them a status which would entitle them to seek a cancel-ation of the deeds. Without these allegations they could have no standing as plaintiffs. There is no prayer for a money recovery of attorney's fees.
>
> "The primary relief sought—cancel-ation of the deeds—will, if granted, directly and injuriously affect the rights of the grantees in said deeds. These grantees are therefore indispensable parties, as the trial court held. Shields v. Barrow, 58 U.S. (17 How.) 129, 15 L. Ed. 158; Garzot v. Rios de Rubio, 209 U.S. 283, 52 L. Ed. 794; Calcote v. Texas Pac. Coal and Oil Co. (CA-5) 157 Fed. (2d) 216; 167 A.L.R. 413, cert. den. 329 U.S. 782, 91 L. Ed. 671, rehearing denied, 329 U.S. 830, 91 L. Ed. 704; Vincent Oil Co. v. Gulf Re-

fining Co. (CA-5) 195 Fed. 434; Keegan v. Humble Oil and Ref. Co. (CA-5), 155 Fed. (2) 971; Lawrence v. Sun Oil Co. (CA-5), 166 Fed. (2) 466.

"The grantees in both deeds are citizens of Texas, as are also the plaintiffs below. Their joinder will therefore destroy diversity and with it the sole ground for federal jurisdiction of this suit. In these circumstances the suit was properly dismissed for lack of indispensable parties." (R. 76-77)

It is clear from the opinion of the Circuit Court as well as the petition for certiorari that the decision of the court does not involve principles, the application of which is of wide public or governmental interest. It presents only the question of construction of a pleading. The decision involves a question of concern only to the immediate parties, a question of no importance to the public. The judgment of the Circuit Court is correct and it is not in conflict with any other decision so as to warrant further review of the case by this Court.

Authorities

Layne & Bowler Corporation v. Western Well Works, Inc., et al., 261 U.S. 387, 393; 43 Sup. Ct. 422; 67 L. Ed., 712;

Magnum Import Co. v. Coty, 262 U.S. 159, 163, 43 Sup. Ct. 531; 67 L. Ed. 922;

Forsyth v. Hammond, 166 U.S. 506, 514; 17 Sup. Ct. 665; 41 L. Ed. 1095;

United States v. Johnston, 268 U.S. 220; 45 Sup. Ct. 496; 69 L. Ed. 925;

United States v. Daniel J. Rimer, 220 U.S. 547; 31 Sup. Ct. 596; 55 L. Ed. 578;

Houston Oil Co. of Texas, et al., v. Goodrich, et al., 245 U.S. 440; 38 Sup. Ct. 140; 62 L. Ed. 385;

Southern Power Co. v. North Carolina Public Service Co., et al., 263 U.S. 508; 44 Sup. Ct. 164; 68 L. Ed. 413;
Hamilton Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251; 36 Sup. Ct., 269; 60 L. Ed. 629;
Robertson & Kirkham on Jurisdiction of the Supreme Court of the United States (1951), Sec. 310, p. 588;
Stern & Gressman on Supreme Court Practice (1950), p. 112;
Moore's Commentary on the U. S. Judicial Code (1949), p. 584;
Cyclopedia of Federal Procedure, 2nd ed., Vol. II, Sec. 5414, pages 55-56;
Address of Chief Justice Hughes before the American Law Institute, 20 A.B.A.J., p. 341;
Address of Chief Justice Taft, 35 Yale L.J., p. 240;
Article by Justice Felix Frankfurter, 48 Harvard Law Review, p. 238;
Article by Henry M. Hart, Jr., 53 Harvard Law Review, p. 595.

Conclusion

The Petition for Writ of Certiorari should be denied.

Respectfully sumitted,

WILL E. ORGAIN,
ORGAIN, BELL & TUCKER,
First Federal Savings Building,
Beaumont, Texas,
Attorneys for Respondent

Copy of this brief in opposition was on this the _____ day of September, 1952, mailed to W. O. Bowers, Jr. and W. D. Gordon, Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 307

W. O. BOWERS, JR. AND W. D. GORDON,
Petitioners and Appellants Below

VERSUS

NONA-FLETCHER MINERAL COMPANY,
Respondent and Appellee Below

REPLY TO BRIEF FOR THE RESPONDENT

MAY IT PLEASE THE COURT:

(1) Respondent's Brief has not challenged a single fact statement of our petition. On page 3 of that brief is this statement:

"There is nothing here involved except the construction of a pleading."

This petition (and that of our co-petitioner) correctly states the pleading.

(2) The sole issue is one of law, viz: The denial of the express provisions of the constitution and statutes (cited and relied upon the petition), refusing the rights, granted by these provisions, to the jurisdiction of the Federal Courts.

On page 4 of Brief for Respondent is this statement: "The decision of the court does not involve principles, the application of which is of wide public or governmental interest. The decision involves a question of concern only to the immediate parties." Then follows this: "The judgment of the Circuit Court is correct".

"Authorities". Respondent cites 16 citations, including 8 cases, 4 text books and 4 personal articles by Chief Justices Hughes and Taft and Associate Justice Frankfurter and a Mr. Hart.

That concludes the Brief for Respondent.

Here is our answer to it—if any answer be needed:

First: Constitutional and statutory rights protect the individual whether of "wide public or governmental interest" or not.

In this case, a few hundred thousand dollars, a large number of stockholders and creditors, including these petitioners, the United States, a partner in every business enterprise, and ordinary common justice are interested. If the test were "of *wide or governmental interest*" there it is. But, of course, that has nothing to do with it any more than an obscure negro boy who has been denied his constitutional right to equal protection of the law.

But let us examine the list of "Authorities" cited in the Brief for Respondent.

The "Index" lists them in the order of their importance. This writer has examined them and here declares that not a single one of these "Authorities" in the slightest degree sustains such proposition on which respondent relies.

I do not have access to the personal articles of the two deceased Chief Justices and the present Associate Justice and the Harvard writer. But I boldly and confidently as-

sert that none of them support such assertion of respondent. Justice Frankfurter is here to speak for himself. I venture to challenge the statement as to the two deceased Chief Justices, based upon my knowledge of their records on this bench, for I do know that no such "authority" was ever left in any authorized report from Marshall to Vinson. Respondent is challenged to prove his assertions.

Moreover, the third listed top "authority" (See Index) cited is HOUSTON OIL CO. OF TEXAS ET AL., v. GOODRICH, 245 U.S. I can speak from primary knowledge as to it. I argued that case before this Court thirty-five years ago. *There was no such issue in that case, nor is such an issue even remotely referred to. I find the same is true of every one of the eight cases cited in the index of "Authorities". It is also true of the four text books listed by respondent,* as disclosed by examination. **Counsel failed to quote from any one of them.** ***Second:*** **Even if plaintiffs below had included such impossible allegations in their original petition, which, of course, they did not,** ***that would not destroy the court's jurisdiction to grant the relief they prayed for on alleged facts set forth as a predicate therefor. Moreover, the 4th ground of our petition here is undeniable and unanswerable.***

Respectfully submitted,

W. D. GORDON,
Attorney for Petitioners

Of Counsel:
W. O. BOWERS, JR.

Opposing counsel has been served with a copy of this paper before filing.